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9/26/00  
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UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF PENNSYLVANIA

DEAN E. BERGSTRESSER,

**1: CV : 00-1713**

Petitioner,

CIVIL ACTION NO.

v.

00-CV-

ROBERT SHANNON, Superintendent,  
SCI Mahanoy; DISTRICT ATTORNEY  
of Potter County; and the ATTORNEY  
GENERAL of Pennsylvania,

**FILED  
SCRANTON****SEP 26 2000**

Respondents.

PER                       
DEPUTY CLERK

Name of Petitioner: Dean E. Bergstresser

Prisoner No.: DE-5044

Place of Confinement: SCI Mahanoy, Frackville, PA

**PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY**

1. Name and location of court which entered the judgment of conviction under attack. Court of Common Pleas, Potter County, Pennsylvania; Coudersport, PA (John B. Leete, J.), Crim. Div. No. 67 of 1996.
2. Date of judgment of conviction. Sentence imposed February 5, 1997; Judgment signed and filed June 25, 1997, upon denial of post-sentence motions. Verdicts returned December 13, 1996.
3. Nature of offenses involved (all counts) Convicted of: involuntary manslaughter, 18 Pa.C.S. § 2504; aggravated assault, 18 Pa.C.S. § 2702(a)(1); reckless endangerment, 18 Pa.C.S. § 2705; homicide by vehicle, 75 Pa.C.S. § 3732; homicide by vehicle while driving under the influence of alcohol, 75 Pa.C.S. § 3735(a); driving under the influence of alcohol, 75 Pa.C.S. § 3731(a)(1),(4),(5)(i); limitation on backing, 75 Pa.C.S. § 3702(a). Acquitted of higher degrees of homicide, 18 Pa.C.S. §§ 2501-2503.
4. Length of Sentence. Eight to seventeen years' imprisonment, consisting of five to ten years for aggravated assault, and three to seven years consecutive for homicide by vehicle while driving under the influence of alcohol; plus costs of the proceedings and restitution of \$2810. Defendant was further sentenced to pay a \$25 fine plus costs on the traffic offense, to attend safe driving school, and to receive substance abuse counseling. No sentences on merged counts (involuntary manslaughter, reckless endangerment, homicide by vehicle, driving under the influence, and unlawful backing up).

5. What was your plea? Not Guilty
6. Kind of trial. Trial by jury of twelve.
7. Did you testify at the trial? No
8. Did you appeal from the judgment of conviction? Yes
9. If you did appeal, answer the following:
  - (a) Name of court: Superior Court of Pennsylvania.
  - (b) Result: Affirmed, No. 1583 PGH 97, noted at 734 A.2d 432 (table)
  - (c) Date of result: Nov. 17, 1998 (reargument denied, Jan. 28, 1999), all. app. denied, 559 Pa. 687, 739 A.2d 1054 (June 24, 1999) (No. 157 W.D.Alloc. 1999)
10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or other motions with respect to this judgment in any court, state or federal? No.
11. If your answer to 10 was "yes," give the following information: D/N/A
12. State concisely every ground on which you claim that you are being held unlawfully.

A. Ground one: Petitioner has been and is being deprived of his liberty in violation of the due process clause of the Fourteenth Amendment, as the evidence at trial was insufficient to convict him of the offense of vehicular homicide while DUI, 75 Pa.C.S. § 3735(a).

**Supporting FACTS:** After fighting in a bar with the decedent, his girlfriend, petitioner drove off in his truck with the girlfriend as a passenger. Both were intoxicated. The decedent exited the truck as it was moving, landing head first on the pavement. Petitioner returned the short distance to the spot where his girlfriend had fallen, driving the truck slowly in reverse. Somehow (whether intentionally, recklessly, or accidentally was at the heart of the trial), a rear wheel of the truck ran over the decedent as it was backing. After stepping out of the truck to try to see what was going on, petitioner then got back in. He shifted to a forward gear, and the same wheel ran over the decedent again. The evidence did not show beyond a reasonable doubt that the decedent's death was "the result of a violation of section 3731 [of title 75, Pa.C.S.] (relating to driving under the influence of alcohol or controlled substance)," nor that petitioner's § 3731 violation

was "the cause of death," both of which are elements of the offense under § 3735(a).

**B. Ground two:** Petitioner has been and is being deprived of his liberty in violation of the due process clause of the Fourteenth Amendment, incorporating the double jeopardy clause of the Fifth Amendment, by the separate convictions and consecutive sentences on aggravated assault, 18 Pa.C.S. § 2702(a)(1), and vehicular homicide while DUI, 75 Pa.C.S. § 3735(a). The conviction and sentence on the "lesser" offense, aggravated assault, must be vacated.

**Supporting FACTS:** At trial, petitioner was convicted of both aggravated assault and vehicular homicide while DUI, and at sentencing received consecutive terms of imprisonment on these counts. Aggravated assault, in the form in which petitioner must have been convicted of it, is the "same offense" (that is, a lesser included offense), for double jeopardy purposes, as involuntary manslaughter (as assault is of any degree of homicide when the death of the victim results), which in turn (as the trial court recognized) is a lesser included offense of vehicular homicide while DUI.

**C. Ground three:** Petitioner has been and is being deprived of his liberty in violation of the due process clause of the Fourteenth Amendment, as the jury's verdict convicting him of aggravated assault, 18 Pa.C.S. § 2702(a)(1), is logically inconsistent with the same jury's verdict convicting him of involuntary manslaughter under 18 Pa.C.S. § 2504.

**Supporting FACTS:** At trial, petitioner was convicted of both aggravated assault and involuntary manslaughter. Malice is an element of the assault offense under § 2702(a)(1) ("recklessly under circumstances manifesting extreme indifference to the value of human life"), while involuntary manslaughter under § 2504 is defined, in pertinent part, as the killing of another person without malice.

**D. Ground four:** Petitioner did not enjoy the effective assistance of counsel at trial, because his attorney failed to satisfy state law requirements for the introduction of evidence of the victim's level of intoxication.

**Supporting FACTS:** The decedent's blood alcohol level at the time of her death was at least .20, significantly higher than petitioner's. Defense counsel briefly attempted to introduce this fact into evidence, but failed to accomplish his goal due to lack of familiarity with controlling state case law on the prerequisites and procedure for doing so. Had the jury known this critical information, there is a reasonable probability that one or more jurors would have entertained at least a reasonable doubt as to whether the cause of death was the decedent's own act of attempting to exit a moving vehicle, rather than petitioner's act of backing up his truck to return to the scene of where she fell.

**E. Ground five:** Petitioner did not enjoy the effective assistance of counsel at trial, when his attorney failed to object to the presentation of testimony at trial by the elected District Attorney of the County, commenting adversely on petitioner's credibility, implying the existence of facts not in evidence, and vouching for the reliability of the Commonwealth's investigation of the matter.

**Supporting FACTS:** The District Attorney of Potter County personally went to the hospital on the night of the incident (March 17, 1996) and interviewed petitioner after administering Miranda warnings. At trial, under examination by his assistant D.A. and after being identified as the District Attorney, the witness testified that he was already "somewhat familiar with Mr. Bergstresser," that he "didn't believe from ... what I had learned from the coroner that the accident happened the way Mr. Bergstresser said it did," and that "to me it didn't ring true what he was telling." He added that "We certainly don't file those charges [including first degree murder] lightly. It was only after substantial investigation that the charges were in fact filed." Defense counsel failed to object or to move to strike any of this testimony.

13. If any of the grounds listed in paragraphs 12A, B, C, D and E were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them. All claims were previously presented on direct appeal.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?  
No.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing  
Joseph Marasco, Esq.  
Friedman and Marasco  
502 Hooker-Fulton Bldg.  
Bradford, PA 16701

(b) At arraignment and plea same  
(c) At trial: same  
(d) At sentencing same

(e) On appeal.

John C. Dowling, Esq.  
James H. Cawley, Esq.  
Rhoads & Sinon LLP  
Dauphin Bank Bldg., 12th Fl.  
One South Market Square  
P.O. Box 1146  
Harrisburg, PA 17108-1146

(f) In any post-conviction proceeding: D/N/A

(g) On appeal from any adverse ruling in a post-conviction proceeding: D/N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time? Yes.

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? No.

WHEREFORE, petitioner prays that the Court:

(1) Enter an order directing the respondent to show cause before this Court within twenty days why a Writ of Habeas Corpus should not be issued;

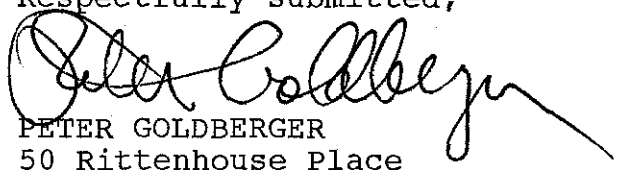
(2) After full consideration on the merits, issue the writ of habeas corpus, releasing him from the respondents' custody unless the Commonwealth of Pennsylvania vacates his convictions or grants him a new trial thereon; and

(3) Grant petitioner such other or further relief as law and justice require.

Dated: September 19, 2000

JOHN C. DOWLING  
JAMES H. CAWLEY  
RHOADS & SINON LLP  
Dauphin Bank Bldg., 12th Fl.  
One South Market Square  
P.O. Box 1146  
Harrisburg, PA 17108-1146

Respectfully submitted,

By:  PETER GOLDBERGER  
50 Rittenhouse Place  
Ardmore, PA 19003-2276

(610) 649-8200

Attorneys for Petitioner

I declare under penalty of perjury that the foregoing is true and correct.

Executed on \_\_\_\_\_.

to be supplied

Petitioner

JS 44  
(Rev. 3/99)**CIVIL COVER SHEET**

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

**I. (a) PLAINTIFFS**

DEAN E. BERGSTRESSER

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Potter  
(EXCEPT IN U.S. PLAINTIFF CASES)**DEFENDANTS**SUPERINTENDENT, SCI MAHANAY, DISTRICT  
ATTORNEY OF POTTER COUNTY, and ATTORNEY  
GENERAL OF PENNSYLVANIACOUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT \_\_\_\_\_  
(IN U.S. PLAINTIFF CASES ONLY)NOTE IN LAND CONDEMNATION CASES USE THE LOCATION OF THE  
TRACT OF LAND INVOLVED**(c) ATTORNEYS (FIRM NAME ADDRESS AND TELEPHONE NUMBER)**Peter Goldberger  
Law Office of Peter Goldberger  
50 Rittenhouse Place  
Ardmore, PA 19003ATTORNEYS (IF KNOWN)  
District Attorney of Potter County  
Harrisburg, PA**1: CV 00-1713****II. BASIS OF JURISDICTION** (PLACE AN "X" IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

**III. CITIZENSHIP OF PRINCIPAL PARTIES** (PLACE AN "X" IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

- |   |                            |                            |   |                            |                            |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
|   | PTF                        | DEF                        |   | PTF                        | DEF                        |
| Citizen of This State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business in This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

**IV. NATURE OF SUIT** (PLACE AN "X" IN ONE BOX ONLY)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury — Med. Malpractice <input type="checkbox"/> 365 Personal Injury — Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Tons to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights	<b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motions to Vacate Sentence <input checked="" type="checkbox"/> 530 Habeas Corpus: General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Emp'l Ret. Inc. Security Act	<b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS — Third Party 26 USC 7609

**V. ORIGIN**

(PLACE AN "X" IN ONE BOX ONLY)

- ☒ Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

**VI. CAUSE OF ACTION**

(CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE BRIEF STATEMENT OF CAUSE DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY)

28 USC 2254 Petition for Writ of Habeas Corpus by a Person in State Custody.

**VII. REQUESTED IN COMPLAINT:**CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 ☐**DEMAND \$**Release from Custody JURY DEMAND: ☐ YES ☒ NO**VIII. RELATED CASE(S) (See instructions):**  
IF ANY NONE

JUDGE \_\_\_\_\_

DOCKET NUMBER \_\_\_\_\_

DATE

9/21/2000

SIGNATURE OF ATTORNEY OF RECORD

Peter Goldberger

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